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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~1264~~ 113

MORRIS PARK, INC., APPELLANT

VS.

ELIZABETH BUCK, APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CONNECTICUT

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

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No.

MORRIS PARK, INC., APPELLANT

VS.

ELIZABETH BUCK, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Connecticut entered on December 30, 1965, affirming a Judgment of the Superior Court of the State of Connecticut for New Haven County at Waterbury entered on December 4, 1964.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported in 153 Conn. 290. The opinion of the Superior Court of the State of Connecticut for New Haven County at Waterbury is not reported. A copy of the Supreme Court opinion is attached hereto as Exhibit A, and a copy of the Superior Court opinion is attached hereto as Exhibit B.

JURISDICTION

In this action in the courts below there was drawn in question the validity of a statute of the State of Connecticut on the ground of its being repugnant to the constitution of the United States, and the decision of the Court below was in favor of its validity. The Connecticut Supreme Court specifically ruled upon this question in its opinion (Exhibit A.). The final judgment in the Court below was dated December 30,

1965; no application for rehearing was made; notice of appeal was filed March 4, 1966, with the Clerk of the Supreme Court of Connecticut. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: Raley v Ohio 360 U.S. 423 Whitney v California 274 U.S. 357; Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123; Angel v. Bullington 330 U.S. 183.

STATUTES INVOLVED

Section 49-14, General Statutes of Connecticut, Revision of 1958, appearing in Volume VIII of said General Statutes at pages 189-190, provides as follows:

> "Upon the motion of any party to a foreclosure, the court shall appoint three disinterested appraisers, who shall, under oath, within ten days after the time limited for redemption has expired, appraise the mortgaged property and shall make written report of their appraisal to the clerk of the court where such foreclosure was had. Such report shall be a part of the files of such foreclosure suit, and such appraisal shall be final and conclusive as to the value of such mortgaged property. The mortgage creditor, in any further action upon the mortgage debt, note or obligation, shall recover only the difference between the value of the mortgaged property as fixed by such appraisal and the amount of his claim; and the court in which such action is pending may, if such appraisal and report thereof have been made, render judgment for the plaintiff for the difference between such appraisal and the plaintiff's claim, provided application for such deficiency judgment has been made by the plaintiff within ninety days after the time limited for redemp-

tion has expired. In reckoning such period of ninety days, the months of July and August shall be excluded from the computation."

QUESTION PRESENTED

Whether or not the Constitutional Right of a party to due process of law has been violated by the ruling of the Supreme Court of the State of Connecticut that under a Connecticut Statute a question of fact (in this instance value of property) is to be finally and conclusively determined by appraisers who are not to give notice of their meeting to determine such fact, who are not to hold a hearing, who are not to receive evidence, who are to make their determination upon their own experience and judgment, and their own estimate as to worth, and whose conclusions may not be reviewed or tested at any stage of the proceedings except as to questions of law, which fact will be used by a Court in determining property rights.

STATEMENT OF THE CASE

This is an action for strict foreclosure of a mortgage of real estate, in which the plaintiff below prayed also for a deficiency judgment under the above quoted statute. Pursuant to that statute appraisers were appointed who met to determine the value of the property without notice to the defendant below, and they came to a conclusion as to value without holding a hearing or receiving evidence, and filed their report with the Superior Court on July 21, 1964. (Pages 14 and 15 of the Connecticut Supreme Court Record). Plaintiff below then moved for a deficiency judgment, her motion being filed August 18, 1964 (Pages 15 and 16 of such record). The defendant below filed a remonstrance (Pages 16 and 17 of such record) stating, inter alia:

"The fundamental right of the defendant to due process of law as guaranteed to it by the most elementary rules of justice, fairness and equity, and as specifically guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and the Twelfth Section of the First Article of the Constitution of the State of Connecticut has been grossly violated by the actions of the appraisers.

"The appraisers met with the attorney for the plaintiff and proceeded to attend to their duties without notice to the defendant, or to its attorneys who have formally appeared in these proceedings. No opportunity was afforded to the defendant to produce evidence or to be heard in any manner. Not only were the doings of the appraisers carried on in secret and without notice but in addition without the actual or constructive knowledge of the defendant or its attorneys.

******

"Wherefore the defendant respectfully moves that the Report of the Appraisers, as on file, be rejected by the Court, and that the Motion of the plaintiff for a Deficiency Judgment be denied.

******

This remonstrance was filed August 31, 1964. The Superior Court in which the proceedings were had was in vacation during July and August of 1964.

Despite the remonstrance the Superior Court accepted the report of the appraisers, noting in its memorandum that it could not find any constitutional violation and that the appraisers appeared to have acted as commanded by the statute and that any quarrel the defendant might have would

appear to be with the demands of the statute. (See the Memorandum of the Superior Court, page 18 of said record and Exhibit B attached hereto)

Also see finding by the Superior Court (p. 25 of said record) which includes:

> "The defendant made the following claims of law respecting the judgment to be rendered, upon which the Court ruled as hereinafter stated:
>
> "25. Lack of notice to the defendant as to the meeting of the appraisers and their meeting with an attorney for the plaintiff deprived the defendant of its rights to appear before them, to be heard, to present evidence, and to present arguments and appeals to reason as to their conclusions.
>
> "26. Such lack of notice and such deprivation of rights above listed constituted a fatal violation of due process of law as guaranteed to the defendant by the most elementary rules of justice, fairness and equity, and as specifically guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and the Twelfth Section of the First Article of the Constitution of the State of Connecticut."
>
> "Notwithstanding said claims, the Court rendered judgment as on file."

Judgment was thereupon entered for the plaintiff below in the Superior Court. (p. 19 and 20 of said record) Exhibit C attached hereto.

The defendant below then appealed to the Supreme Court of Connecticut and in such appeal specifically raised the Constitutional issue:

"The questions of law which it desires to have reviewed are:

"1. Did the court err in concluding that the action of the appraisers in meeting with an attorney for the plaintiff and coming to a conclusion of value without notice to the defendant or affording the defendant an opportunity to appear, to be heard, to present evidence, and to present arguments and appeals to reason did not violate due process of law as guaranteed to it by the most elementary rules of justice, fairness and equity, and as specifically guaranteed to it by the Fourteenth Amendment to the Constitution of the United States and the Twelfth Section of the First Article of the Constitution of the State of Connecticut?"******

"ASSIGNMENT OF ERROR"

A.

"The Court erred in overruling the remonstrance to the appraisers' report and in accepting such report.

B.

The Court erred:******

"5. In overruling the claims of law stated in paragraphs 25 and 26 of the finding,"

all as appears on page 21 of said record.

The Constitutional issue was preserved by the brief before the Connecticut Supreme Court, one section of the appellant's (defendant below) brief being captioned "The controlling statute is on its face unconstitutional under both the Fourteenth Amendment to the United States Constitution and Sec-

tion 12 of Article First of the Connecticut Constitution" (page 5 of the brief included in the record) and another section being captioned "The actions of the appraisers were unconstitutional in that they deprived the defendant of property without due process or due course of law" (page 11 of the brief included in the record) and the plaintiff below recognized this issue in her brief before the Connecticut Supreme Court (pages 6 to 15 of plaintiff's brief included in the record.)

The Connecticut Supreme Court specifically recognized the constitutional issue stating in its opinion: "The defendant claims that General Statutes Section 49-14 is unconstitutional in that it makes no provision for notice of the meeting of the appraisers to be given to the mortgagor so that the latter may introduce evidence and be heard on the question of value, thus depriving the mortgagor of its property without due process of law in violation of the federal and state constitutions." Nevertheless the Connecticut Supreme Court sustained the validity of the statute. Its Judgment is Exhibit D attached hereto.

THE QUESTIONS ARE SUBSTANTIAL

The ruling of the Connecticut Supreme Court purports to legitimatize a grossly unfair method of determining a fact which appears to be squarely at variance with decisions of the Supreme Court of the United States. If not reversed it could well provide an apparently appealing method of determining facts in many situations. It would substitute "efficiency" for justice.

It is a fundamental element of due process that a litigant must be provided, at some stage of the proceedings, a forum which is mandated to give that litigant notice that it intends to act and an opportunity to appear, to be heard on the merits both as to presentation of evidence and as to appeals

to reason, and only then to render a decision as to facts which is binding upon that litigant.

Thus, this Court has ruled that it is essential to due process that a litigant is entitled to a full hearing before a tribunal empowered to perform the judicial function involved, and must be afforded the right to introduce evidence and have judicial findings based thereon; Baltimore & Ohio Ry Co v. U.S. 298 U.S. 349; that the hearing must be mandatory and not merely a matter of favor or discretion; Coe v. Armour Fertilizer Works, 237 U.S. 413; that the hearing to determine a fact must not be a mere matter of form but the litigant must be afforded the right to secure and present evidence material to the issue and be afforded the opportunity by proof and argument to controvert a claim asserted against it before a tribunal bound to listen and to give effect to what has been established; Washington ex rel Oregon Ry and Nav. Co. v. Fairchild, 224 U.S. 510; that the party must be given an opportunity to know what evidence has been offered or considered and to test, explain or refute the same; I.C.C. v. Louisville and W.R. Co. 227 U.S. 88; that the parties must be given an opportunity to be heard on the merits at some stage of the proceedings before final judgment is entered; Wilson v Standefer, 184 U.S. 399; that the litigant must not be concluded as to a question of fact without notice or an opportunity for hearing; Central of Georgia R. Co. v. Wright, 207 U.S. 127; that at some stage of the proceedings the litigant be afforded the opportunity of a hearing on the merits; Bragg v. Weaver, 251 U.S. 57; and Bailey v. Anderson, 326 U.S. 203; that a determination of a fact without notice, without hearing, without evidence and without the opportunity for a general judicial review violates due process; Southern R. Co. v. Virginia, 290 U.S. 190; that the constitutional right to a full hearing includes the right to introduce evidence; Baltimore and O Ry. Co. vs. U. S. 298 U.S. 349; in short that there must

be notice and an opportunity to be heard, Best v Humbold Placer Mining Co., 371 U.S. 334, Link v. Wabash Ry Co. 370 U.S. 626; Schroeder v New York City, 371 U.S. 208;

Such decisions of this Court to the contrary notwithstanding the Connecticut Supreme Court stated in its decision on this matter that "An appraiser sets a value on property at his estimate of what it is worth.****** The appraisers determine the value of property upon their own experience and judgment. Consequently, they are not required to hear evidence or to give notice of the meeting at which they make the appraisal.****** General Statutes, Section 49-14 provides that the appraisal made thereunder shall be final and conclusive as to the value of the mortgaged property. Upon a remonstrance being filed, the power of the court to review the question of value is limited to questions of law. Equitable Life Assurance Society v Slade, 122 Conn. 451, 456, 190 A. 616." (See Exhibit A)

Thus the Connecticut Court is clearly standing upon the Equitable Life case above cited. In the trial court decision on that case (3 Conn. Sup. 395-404) Judge Baldwin had conducted a hearing on the merits and had substituted his own conclusions as to fact for at least some of those made by the appraisers. The Connecticut Supreme Court, on appeal, as above cited, ruled.

1. that the trial court was without power to conduct a hearing on the merits (p. 454—"The statute precludes a review by the Court of the question of value as a question of fact, and limits the inquiry before it to questions of law."**** p. 455—"..... that there might be no doubt that the court's function in determining value in all its aspects had been transferred to the appraisers, the act provided: 'such appraisal shall be final and conclusive as to the value of said mortgaged property' "****** p. 456 "In short, as already

stated, its power to review the question of value here does not extend to the determination of it as a question of fact but is limited to questions of law")

2. that there could be no opportunity for hearing before the appraisers for (p. 458) ". . . . . having no power under the statute to summon witnesses or hear evidence, as does a committee named in proceedings to hear evidence and make a report based upon it, they are appointed that they may, in the light of such personal knowledge as they have or may acquire, bring to bear upon the matter of value their own judgment. In so far as their conclusion involves the exercise of judgment upon their part, it of course cannot be reviewed."

Accordingly, it is clear that Connecticut has ruled that a question of fact is to be determined, pursuant to a Connecticut statute, by a tribunal which is, not only not bound but is powerless, to afford a hearing or receive testimony or appeals to reason; that insofar as it is powerless to hold a hearing no purpose is to be served in giving notice of its meeting; and that its determination as to the facts is final and conclusive except as to errors of law; in other words at no stage of the proceedings is a party to be afforded an opportunity for a hearing on the merits.

The finding of facts in the Connecticut proceedings on this case are somewhat ambivalent in that it is never clearly spelled out whether or not the appellant had notice of the meeting of the appraisers or whether or not they held a hearing. This ambivalance in this instance is immaterial insofar as the Connecticut Court has ruled that as a matter of law they "are not required to hear evidence or give notice of the meeting at which they make the appraisal." Also, it is clear that despite the murkiness of the finding of facts on these points both the Superior Court and the Connecticut Supreme Court based their decisions on the concept that no notice had been

given nor hearing held and that neither was requisite.

The appellant is not before this tribunal because of what three individuals may or may not have done; it is here because the Sovereign State of Connecticut has mandated that its rights are to be determined in a manner contrary to basic concepts enunciated by this tribunal; even if the appraisers had attempted on their own initiative to give notice and hold a hearing this would have been a matter of happenstance, of favor, of accident, of luck; furthermore, the Sovereign State of Connecticut has ruled that such notice, if it had been given, and such hearing, if it had been held, would each be a nullity because the appraisers were without power to hold a hearing and accordingly notice would be meaningless.

It is submitted that the decision of the Supreme Court of Connecticut fails to recognize and apply the appropriate Constitutional limitations and provisions. We believe that the questions presented by this appeal are substantial and that they are of public importance.

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EXHIBIT A

SUPREME COURT

November Term, 1965

ELIZABETH F. BUCK *v.* MORRIS PARK, INC.

Action to foreclose a mortgage, brought to the Superior Court in New Haven County at Waterbury, where, after judgment of foreclosure and failure to redeem, appraisers were appointed who filed their report, to which the defendant filed a remonstrance and the plaintiff having filed a motion for a deficiency judgment, the court, *Cotter, J.*, denied the remonstrance, accepted the report, and rendered a deficiency judgment, from which the defendant appealed. *No error.*

James T. Healey, with whom, on the brief was *Frank T. Healey, Jr.*, for the appellant (defendant).

Robert H. Alcorn, with whom were *Francis R. Cassidy, Jr.*, and, on the brief, *Arthur T. Connor*, for the appellee (plaintiff).

MURPHY, J. The plaintiff obtained a judgment of strict foreclosure of a $35,000 mortgage on the defendant's property, which the defendant failed to redeem before the expiration of its period of redemption on July 15, 1964. Upon motion of the plaintiff, three disinterested appraisers were appointed by the court, and they, under oath, within ten days after the time limited for redemption, appraised the mortgaged property and made written report thereof to the court as required by General Statutes § 49-14. The defendant filed a remonstrance to the acceptance of the report which the court, after hearing, overruled. The report was accepted, and a supplemental judgment was rendered for the deficiency between the total amount due on the mortgage debt with costs and fees and the appraised value of the property. The defendant has appealed from that judgment.

The defendant claims that General Statutes § 49-14 is unconstitutional in that it makes no provision for notice of the meeting of the appraisers to be given to the mortgagor so that the latter may introduce evidence and be heard on the question of value, thus depriving the mortgagor of its property without due process of law in violation of the federal and state constitutions. In support of this contention, the defendant avers that the appraisers should conduct a hearing and hear evidence in a manner similar to the procedure followed by referees and committees in assessing damages for the taking of land by the highway commissioner for highway purposes and for the condemnation of land for other public uses. General Statutes §§ 13a-76, 48-12. In this it is mistaken. The purpose and manner of appraising and determining the value of property as a quasi-judicial act on a motion for a deficiency judgment is entirely distinct and different from the judicial act of a committee in assessing the amount of damages in eminent domain. So far as the dicta in *Antman* v. *Connecticut Light & Power Co.*, 117 Conn. 230, 239, 167 A. 715, can be construed to the contrary, it is overruled. An appraiser sets a value on property at his estimate of what it is worth. *Beach* v. *Trumbull*, 133 Conn. 282, 290, 50 A.2d 765; *Cocheco Mfg. Co. v. Stafford*, 51 N.H. 455, 482; *McAdams* v. *Bolsinger*, 57 Ohio Op. 338, 340, 129 N.E.2d 878. The appraisers determine the value of property upon their own experience and judgment. Consequently, they are not required to hear evidence or to give notice of the meeting at which they make the appraisal. *Vincent* v. *German Ins. Co.*, 120 Iowa 272, 278, 94 N.W. 458.

General Statutes § 49-14 provides that the appraisal made thereunder shall be final and conclusive as to the value of the mortgaged property. Upon a remonstrance being filed, the power of the court to review the question of value is limited

to questions of law, *Equitable Life Assurance Society* v. *Slade*, 122 Conn. 451, 456, 190 A. 616. The constitutional due process requirements are satisfied where the complainant has had reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Dohany* v. *Rogers*, 281 U.S. 362, 369, 50 S. Ct. 299, 74 L. Ed. 904; *Missouri ex rel. Hurwitz* v. *North*, 271 U.S. 40, 42, 46 S. Ct. 384, 70 L. Ed. 818; *Proctor* v. *Sachner*, 143 Conn. 9, 17, 118 A.2d 621. It must be borne in mind that this was an action for the foreclosure of a mortgage on the defendant's property. The mortgage was the security for the money loaned to the defendant. It appeared and participated in the foreclosure. It obtained an extension of the law day by stipulation with the plaintiff and had the opportunity to redeem but did not do so. It had notice of the appointment of the three appraisers and in fact nominated one of those selected. It also had notice of the motion for deficiency judgment and was fully heard on its remonstrance to the acceptance of the appraisers' report. Nothing more was required to protect the rights of the defendant. The due process clause in the federal constitution does not guarantee any particular form or method of state procedure to the citizens of the state. *Proctor* v. *Sachner*, supra.

The record indicates that the defendant's attitude is motivated by the action of the appraiser it nominated in signing a unanimous appraisal report on the value of the property at a figure considerably lower than his personal belief. There was nothing to prevent him from filing a minority report if he did not agree with his coappraisers on the valuation. See *Congress Bank & Trust Co.* v. *Brockett*, 111 Conn. 490, 491, 150 A. 742.

There is no error.

In this opinion the other judges concurred.

EXHIBIT B

MEMORANDUM AS TO REMONSTRANCE TO ACCEPTANCE OF APPRAISERS' REPORT

In the writ, summons and complaint the plaintiff asked for a deficiency judgment. In response to plaintiff's motion the Court appointed Thomas McKeon, Peter Luddy and Theodore Carroll on May 29, 1964, as a committee, under § 49-14. Final law day was July 15, 1964. On July 18, 1964, the committee met with an attorney for the plaintiff, were sworn, viewed the property, came to an opinion of value and executed their report which was filed in Court July 21, 1964.

The appraisers acted under the requirements set forth in § 49-14 and returned their report in accordance therewith.

The Court cannot find any constitutional violation in the procedure undertaken and the appraisers appeared to act as commanded by the statute. Any quarrel the defendant has would appear to be with the demand of § 49-14. *Miller* vs. *Meany*, 12 Conn. Sup. 402; *Dunn* vs. *Flynn*, 107 Conn. 272; *Congress Bank & Trust Co.* vs. *Brockett*, 111 Conn. 490; *Wilcox* vs. *Bliss*, 116 Conn. 329; *Equitable Life Assur. Soc.* vs. *Slade*, 122 Conn. 451.

The report is accepted and the remonstrance denied.

COTTER, J.

[Filed at Superior Court, Waterbury. Date: November 25, 1964.]

EXHIBIT C

State of Connecticut

No. 28697

ELIZABETH F. BUCK, widow, of Fort Pierce, in the State of Florida *vs.* MORRIS PARK, INC., a corporation organized under the laws of the State of Connecticut and having its principal office in the Town of Waterbury, County of New Haven and State of Connecticut.	Superior Court, New Haven County, held at Waterbury, December 4, 1964.

SUPPLEMENTAL JUDGMENT FOR DEFICIENCY ON STRICT FORECLOSURE

A judgment having been rendered in this action on March 20, 1964, for the strict foreclosure of the plaintiff's mortgage, whereby the plaintiff's mortgage debt was found to be $36,703.34, together with attorney's fees of $600.00 and the costs of the suit taxed at $201.05, which were due from the defendant, Morris Park, Inc., to the plaintiff, and whereby also the last date for the redemption for said mortgage by the payment to the plaintiff of said debt, interest, attorney's fees and costs was limited to June 15, 1964, the case came thence to May 29, 1964, when upon application of the plaintiff, the Court appointed Theodore Carroll, Peter Luddy and Thomas McKeon, disinterested persons, to appraise the mortgage premises and make their report to the Court; and thence to June 12, 1964, when the Court, upon the stipulation of the parties to said action, reopened said judgment of strict foreclosure for the purpose of extending

the day of redemption from June 15, 1964, to July 15, 1964, otherwise said judgment to remain the same; and thence to July 21, 1964, when said appraisers filed their report, appraising said premises, under oath, at $25,000.00; and thence to September 18, 1964, when the Court accepted said appraisers' report and denied the defendant's remonstrance to the acceptance of said appraisers' report.

The Court having heard the parties finds that said appraisers' report should be and is hereby accepted and approved; and further finds that said mortgaged premises were not redeemed by any party thereto and that title vested in the plaintiff on July 16, 1964; that there was on said July 16, 1964, an encumbrance on said mortgaged property which was and is prior to the plaintiff's mortgage as follows: Taxes to the Town of Wolcott, with interest and lien thereon to said day, amounting in the whole to $941.21; that there was due to the plaintiff on said day the amount found due by said judgment on said March 20, 1964, the original date of said judgment, $36,703.34, and costs of $201.05 and attorney's fees of $600.00, with interest on said mortgage debt from said March 20, 1964, to said July 16, 1964, amounting to $676.65, making a total sum of $39,122.25; and that the balance of the mortgage debt and attorney's fees and costs, deducting the value of the property as fixed by said appraisers less said prior encumbrance, amounts to $14,122.25.

Whereupon it is adjudged that the plaintiff recover of the defendant, Morris Park, Inc., $14,122.25 plus the costs of these proceedings taxed at $.....

COTTER,
Judge.

EXHIBIT D

STATE OF CONNECTICUT

At a Supreme Court of Errors Held at Hartford .....

On the First Tuesday of November, A.D. 1965

Present, Hon. John H. King, Chief Justice,

Hon. James E. Murphy
Hon. James C. Shannon
Hon. Charles S. House
Hon. William P. Barber
Associate Judges.

Elizabeth F. Buck, widow, of Fort Pierce, in the State of Florida

vs.

Morris Park, Inc., a corporation organized under the laws of the State of Connecticut and having its principal office in the City of Waterbury, County of New Haven, State of Connecticut.

On Appeal From The Superior Court For New Haven County at Waterbury

JUDGMENT

This appeal by the defendant claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this Court, was allowed by the Superior Court for New Haven County at Waterbury, on the 15th day of December, A.D. 1964, and came to this Court, at its term held at

Hartford, on the first Tuesday in May, A.D. 1965, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said ..... Superior Court for New Haven County at Waterbury, ... there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the ..... appellee recover of the appellant ..... her ..... costs taxed at $.....

Date of judgment, December 30, 1965.

By the Court,

Edward Horwitz

Clerk

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~1264~~ 113

MORRIS PARK, INC., APPELLANT

VS.

ELIZABETH F. BUCK, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

MOTION TO DISMISS OR TO AFFIRM

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The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of The Supreme Court of Errors of the State of Connecticut on the grounds that the appeal does not present a substantial federal question, and that said question was not raised in the Court below.

I

STATEMENT

This is an action for strict foreclosure of a mortgage wherein the appellee asked for a deficiency judgment. After a judgment of strict foreclosure was obtained, three appraisers were appointed by the Court to determine the value of the foreclosed property for purposes of a deficiency judgment should the defendant fail to redeem. (Page 23 of the Record of the Supreme Court of Errors of the State of Connecticut). The appellant had the selection of an appraiser. (Page 23 of said Record). The original judgment of strict foreclosure was opened for the purpose of extending the original law day to July 15, 1964, in accordance with judicial approval of the parties' stipulation to so extend the law day. (Pages 12 and 13 of said Record). The appellant failed to redeem on July 15, 1964, said law day. (Page 23 of said Record). On July 18, 1964, the three appraisers convened, were duly sworn in, viewed the property, and rendered their report. (Pages 23 and 24 of said Record). Said report, which valued the property at $25,000.00, was signed by each of the three appraisers. (Pages 23 and 24 of said Record). Said report was filed in Court on July 21, 1964. (Page 15 of said Record).

A remonstrance to the report of the appraisers was filed by appellant on August 31, 1964. A hearing on the remonstrance

was regularly assigned and such hearing was had before Cotter, J. on September 18, 1964 with appellant's officers, witnesses and attorney in attendance. On November 25, 1964, the report was accepted by the Court and the remonstrance denied. A supplemental judgment for deficiency was rendered by said court on December 4, 1964. (Page 19 of said Record). On December 15, 1964, the appellant filed its appeal from said judgment to the Supreme Court of Errors of the State of Connecticut. (Page 20 of said Record). On December 30, 1965, said Supreme Court of Errors rendered its judgment confirming said supplemental judgment for deficiency. The appellant has appealed to the Supreme Court of the United States.

II

ARGUMENT

The motion to dismiss should be granted for the following reasons:

A. There is no substantial Federal question raised because

1. The appellant had full notice

(a) A claim for a deficiency judgment was contained in the original complaint, thereby putting appellant on notice that appellee would exercise her rights under the Connecticut statute.

(b) At the time of the hearing when the law day was originally fixed, appellant was fully heard as to value (Record, Page 9).

(c) The Court, on appellee's motion, appointed appraisers (Record, Page 10). It is fair to assume that appellant's counsel knew the statutory provisions in relation thereto.

(d) Appellant's counsel signed a stipulation reopening and extending the law day (Record, Page 10).

(e) One of the appraisers was appointed by the Court upon nomination by appellant (Finding, ¶ 7).

(f) Appellant filed a remonstrance to the appraisers' report and was fully heard. (Record, Page 16; Appendix to briefs of both appellant and appellee filed with Supreme Court of Connecticut).

(g) Appellant was at all times represented by competent counsel, who knew or should have known, every detail of the matter.

B. The present question was not raised in the Court below:

1. (a) The remonstrance filed by the appellant is specifically based on the claim that "no opportunity was afforded to the defendant to produce evidence or to be heard in any manner" (Record, Page 17).

(b) The present appeal is based (Jurisdictional Statement, Page 14) upon the abstract question, not raised below that ". . . . even if the appraisers had attempted on their own initiative to give notice and hold a hearing this would have been a matter of happenstance, of favor, of accident, of luck; furthermore, the Sovereign State of Connecticut has ruled that such notice, if it had been given and such hearing, if it had been held, would each be a nullity because the appraisers were without power to hold a hearing and accordingly notice would be meaningless."

(c) This is not the question stated in III of the Notice of Appeal, and violates the Rules of the Court, 15 (2).

2. The appellant is on the horns of a dilemma. Either the appraisers should have given notice or they shouldn't have. If they should have (and did not) then we have a damnum absque injuria situation because the facts show appellant's rights were fully protected by adequate judicial hearings. Now, appellants claim, for the first time, that even if the appraisers had given notice, it would have been ineffective. The question is moot, and will not be considered by this Court. *Doremus v. Board of Education*, 342 U. S. 429; *Poe v. Ullman*, 367 U. S. 497; *Nostrand v. Little*, 368 U. S. 436; *Arlan's Dept. Store v. Kentucky*, 371 U. S. 218.

It is not necessary to encumber this motion with numerous citations, but a few are in order.

"The due process clause does not guarantee to a citizen of a State any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or defence, due regard being had to the nature of the proceedings and the character of the rights which may be affected by it." *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 42.

More recent decisions, to the same effect and citing intermediate decisions, are *Mullane v. Central Hanover Bank and Trust Co.*, 339 U. S. 306; also *Schroeder v. City of New York*, 371 U. S. 208.

A very recent statement is in *Armstrong v. Manzo*, 380 U. S. 545, where it was said "A fundamental requirement of due process is 'the opportunity to be heard' . . . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner."

III

CONCLUSION

Wherefor, appellee respectfully submits that this appeal does not present a substantial federal question; that the federal question sought to be reviewed was neither timely, nor properly raised; and that the question is moot.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. ~~1264~~ 113

MORRIS PARK, INC., APPELLANT

VS.

ELIZABETH BUCK, APPELLEE

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CONNECTICUT

REPLY TO MOTION TO DISMISS OR TO AFFIRM

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REPLY TO MOTION TO DISMISS OR TO AFFIRM

Appellee's motion to dismiss or affirm appears to raise three points, somewhat intermixed.

1. Appellee suggests notice of various preliminary and subsequent proceedings cured any possible vice in lack of notice or opportunity for hearing at the unique, critical, substantive stage of determination of a fact on the merits. This is the same as saying that a defendant may be deprived of his right to council at his trial provided he is represented at his arraignment and appeal.

2. Appellee suggests that insofar as appellant was given a full hearing at certain stages of the proceedings it is immaterial that it was given no opporunity for hearing at the most critical stage.

It is conceded, even though not in the record before this Court, that on March 20, 1964, the Connecticut Trial Court's hearing on the question of lengh of time for redemption after foreclosure took into consideration evidence as to value of the property, this being an element required of the Court for this limited purpose. See Metopolitan Life Insurance Company v. Bassford, 120 Conn. 384.

But: 1. the Court made no finding as to value (see its Judgment, pages 7 to 9 of the Connecticut Supreme Court Record) and 2. whatever it may have considered or determined would have no effect upon, and probably would be unknown to, and definitely would not be binding upon, the appraisers, who are governed by Sec. 49-14 Conn. General Statues, and Equitable Life Assurance Society v. Slade, 122 Conn. 451.

It is also conceded that appellant had a full hearing before the Connecticut Trial Court on its Remonstrance. But the opinions below make it crystal clear that the Appellant was limited to a review as to matters of law and could not be heard on the merits. It is particularly significant that neither the trial nor the appellate Court made a finding as to value, and indeed considered themselves powerless to do so.

The essential point of this entire matter, denial of an opportunity to be heard at any time on the merits of the essential issue, value for the purpose of a deficiency Judgment, is totally ignored and sidestepped by the appellee. The Connecticut Courts did not ignore it; they decided such a right did not exist.

3. Appellee suggests that Appellant is attempting to raise a question in this Court not considered in the Court below. But the Connecticut Court stated that he appraisers "are not required to hear evidence or give notice of the meeting at which they make the appraisal." The Court further adopted the Equitable Life Assurance Society case which states the appraisers have "no power under the statute to summon witnesses or hear evidence."Insofar as the Connecticut Court passed upon these Federal Questions the suggestion in the Motion to Dismiss is groundless. Illinois ex rel McCollum v. Board of Education, 333 U.S. 203; Raley v. Ohio, 360 U.S. 423.

It is submitted that to fail to recognize that the question stated in III of the Notice of Appeal, substantially quoted on Page 6 of the Jurisdictional Statement, paragraph captioned "Question Presented," does not fairly comprise the language quoted by Appellee in her Motion to dismiss or Affirm, Page 5, B 1. (b) is to place an entirely undue burden on the English language. It is in essentials simply a transposition rather than a new theme.

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END